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# DOES ALL THIS LITIGATION "REFORM" REALLY BENEFIT THE CLIENT?

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## INTRODUCTION

Since it became law on December 1, 1990, the Civil Justice Reform Act ("CJRA")<sup>1</sup> has mandated an unprecedented nationwide effort to reform the handling of civil cases in the federal district courts. Under the CJRA, each of the nation's ninety-four district courts is directed to develop its own "civil justice expense and delay reduction plan" to promote the more efficient resolution of civil disputes.<sup>2</sup> Although it is too early to evaluate definitively whether these plans will result in faster and less expensive federal civil litigation, there is no question that the CJRA has spawned bold, continuing efforts across the nation that seek to foster more efficient federal civil litigation.<sup>3</sup>

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<sup>1</sup> Civil Justice Reform Act of 1990 ("CJRA"), 28 U.S.C. §§ 471-482 (1993).

<sup>2</sup> *Id.* § 471.

<sup>3</sup> See, e.g., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE DIST. OF MONT. (1992); CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE E. DIST. OF CAL. (1991); REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE E. DIST. OF CAL. (1991); REPORT OF THE ADVISORY COMMITTEE AND PLAN PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 ADOPTED BY THE FEDERAL DISTRICT COURT, U.S. DIST. CT. FOR THE S. DIST. OF CAL. (1991); THE CIVIL JUSTICE REFORM ACT OF 1990 EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. AND BANKR. CT. FOR THE DIST. OF IDAHO (1991); CIVIL JUSTICE DELAY AND EXPENSE REDUCTION PLAN, U.S. DIST. CT. FOR THE S. DIST. OF ILL. (1991); CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE N. DIST. OF IND. (1991); REPORT OF THE ADVISORY GROUP ON THE REDUCTION OF COST AND DELAY IN CIVIL CASES, U.S. DIST. CT. FOR THE N. DIST. OF IND. (1991); CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE S. DIST. OF IND. (1991); CIVIL JUSTICE REFORM ACT EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE DIST. OF KAN. (1991); EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE DIST. OF MASS. (1991); CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN FOR IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE DIST. OF N.J. (1991); CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST.

This Article considers whether the litigation reforms developed under the mandates of the CJRA will actually benefit clients. The CJRA reforms seek to benefit various legitimate interests involved in the civil litigation process, such as the judiciary, the lawyers, the court system, the taxpayer, and the public.<sup>4</sup> Accordingly, the interests of clients are not the only interests to be considered in formulating litigation reforms. Nevertheless, despite the legitimate interests of numerous parties, the proponents of the reforms frequently focus on the benefits conferred on clients.<sup>5</sup> Additionally, any reforms which do not improve the operation of the litigation process for those who use it are, at least, highly suspect. Thus, we examine these reforms from the perspective of the client, but remain aware that there are other valid interests which should be considered in evaluating litigation reforms.<sup>6</sup>

Proponents of the CJRA argue that the reforms will reduce both the length of time required to resolve disputes and the cost of litigation to clients.<sup>7</sup> Critics, however, argue that the reforms will add to the delay and cost of litigation by creating new and uncer-

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CT. FOR THE E. DIST. OF N.Y. (1991) [hereinafter EDNY PLAN]; CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE W. DIST. OF OKLA. (1991); CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE DIST. OF OR. (1991); CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN AND REPORT OF THE ADVISORY GROUP UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE E. DIST. OF PA. (1991); REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE W. DIST. OF TENN. (1991); CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE DIST. OF TEX. (1991); REPORT AND PLAN OF THE ADVISORY GROUP, U.S. DIST. CT. FOR THE DIST. OF V.I. (1991); REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE E. DIST. OF VA. (1991); REPORT OF THE ADVISORY GROUP AND PLAN FOR IMPLEMENTATION OF THE CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE S. DIST. OF W. VA. (1991); CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE DIST. OF WYO. (1991) [individual reports hereinafter CJRA REPORT, — DIST. OF —].

<sup>4</sup> See S. REP. NO. 416, 101st Cong., 2d Sess. 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6806 (explaining need to seek input from various groups when developing plan).

<sup>5</sup> See *id.* at 2-3, 12, *reprinted in* 1990 U.S.C.C.A.N. at 6804-05, 6814-15.

<sup>6</sup> See *id.* at 4, *reprinted in* 1990 U.S.C.C.A.N. at 6806; see also *Evaluating Proposals for Civil Justice Reform*, 76 JUDICATURE 108, 108 (1992) (listing competing values within justice system).

<sup>7</sup> See S. REP. NO. 416, *supra* note 4, at 14, *reprinted in* 1990 U.S.C.C.A.N. at 6817 (stating that six principles of reform are aimed at reducing cost of litigation and number of delays); see also Joseph R. Biden, Jr., *Equal, Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990*, 1 CORNELL J.L. & PUB. POL'Y 1, 13-16 (1992) (describing attempt at national implementation of cost and delay reduction).

tain rules that are sure to result in expensive and protracted satellite litigation.<sup>8</sup>

While it is too early to offer more than preliminary thoughts as to whether the expense and delay reduction plans will achieve their goals,<sup>9</sup> it is clear that these plans must be understood by litigants and their counsel. For litigants to both benefit from and take full advantage of the reforms, attorneys must develop an understanding of the methods that the plans employ to reduce expense and delay. If the CJRA reforms are thoughtfully applied by courts and litigants to individual cases, it is likely that they can help reduce the actual and perceived expense and delay about which clients so often complain.

Part I of this Article examines the six principles and six techniques that the CJRA sets forth for the more efficient and less costly resolution of civil litigation. Part II considers several provisions of the expense and delay reduction plans developed in the Southern and Eastern Districts of New York that are likely to have a significant impact on clients. Part III suggests several steps attorneys and clients may take to integrate the CJRA reforms into a system of litigation management to ensure that the reforms enhance the efficient and economically rational resolution of cases, instead of merely becoming additional steps in the already costly litigation process.

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<sup>8</sup> See Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1422-27 (1992) (examining implications of complex procedures in civil lawsuits under CJRA). According to Professor Tobias, the "nascent implementation" of the CJRA "threaten[s] the continued viability of a uniform, simple system of procedure." *Id.* at 1393; see D. Jeffrey Campbell & Jonathan R. Kuhlman, *Civil Justice Reform Act of 1990: An Experiment Gone Awry*, 60 DEF. COUNS. J. 17 (1993) (describing uncertainty sure to result from mandatory disclosure requirements); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 438-40 (1992) (concluding that CJRA subverts proper rulemaking authority); Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, LAW & CONTEMP. PROBS., Summer 1990, at 105, 118 (acknowledging that success of CJRA will depend on users of civil justice system); Dana B. Taschner & Robin L. Filion, *The Judicial Improvements Act of 1990: Historic Changes in Federal Civil Procedure Aimed at Improving the Efficiency of Federal Courts and Reducing the Uncertainty and Cost Associated with Federal Litigation*, 23 HAW. BUS. J. 41 (1991) ("[T]he broad scope of the Act will have far-reaching consequences for litigation in the federal courts and will reduce much of the uncertainty, cost and delay associated with civil litigation.").

<sup>9</sup> A majority of the plans were adopted in the past two years. See *supra* note 3 (listing various plans and dates of adoption).

THE LIMITATIONS OF PROCEDURAL REFORM: A CAUTIONARY  
PRELUDE

At the outset, it should be noted that the CJRA will not solve some of the most significant problems causing delays in the handling of civil cases in the district courts. To a large extent, these delays are the product of judicial vacancies<sup>10</sup> and the priority that district courts are statutorily required to give to criminal cases.<sup>11</sup> For instance, in the Civil Justice Expense and Delay Reduction Plan adopted by the Board of Judges of the Southern District of New York on December 12, 1991, the court noted that any delay in civil cases appears to be attributable to the large number of judicial vacancies and the priority criminal cases must receive under the Speedy Trial Act.<sup>12</sup>

In addition to judicial vacancies, the statutorily authorized number of judges in some districts has been insufficient to handle

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<sup>10</sup> See Victor Williams, *Solutions to Federal Judicial Gridlock*, 76 JUDICATURE 185 (1993) (discussing factors contributing to judicial gridlock). Chief Justice Rehnquist suggests that the insufficient number of federal judges and the disturbing amount of vacancies will result in the downfall of the federal system as a whole. See Linda Greenhouse, *Ease Load on Courts, Rehnquist Urges*, N.Y. TIMES, Jan. 1, 1992, § 1, at 8; William Rehnquist, *The Supreme Court and Society, Rehnquist's Reducing Plan*, THE RECORDER, Jan. 21, 1992, at 9 (excerpt from Rehnquist's 1991 year-end report on federal judiciary). In New York, there are currently eight vacancies in the 28-judge Southern District, three in the 15-judge Eastern District, and three in the 13-judge United States Court of Appeals for the Second Circuit. Southern District Chief Judge Thomas P. Griesa believes that this drastic shortage creates an "absolute emergency." Deborah Pines, *Swift Action on Judges Promised*, N.Y. L.J., June 28, 1993, at 1.

<sup>11</sup> Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (1988 & Supp. 1992); see Mulenix, *supra* note 8, at 401-02 (noting that, in many districts, main reason for civil docket backlog is Speedy Trial Act).

<sup>12</sup> See CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, U.S. DIST. CT. FOR THE S. DIST. OF N.Y. 2 (1991) [hereinafter SDNY PLAN]. The need for alternative dispute resolution is even more apparent given statistical data reporting that the total number of cases filed in federal courts climbed from 33,591 in 1938 to 217,879 in 1990, the total number of civil filings increased from 207 per judgeship in 1955 to 448 per judgeship in 1990, and the median length of time from joinder of issue to trial increased from 9.1 months in 1955 to 14 months in 1990. See Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 889-90 (1991); see also William H. Rehnquist, *Seen in a Glass Darkly: The Future of Federal Courts*, 1993 WIS. L. REV. 1, 2 (commenting on current burdens on federal judiciary). But see Stephen Daniels, *Are Caseloads Really Increasing? Not Necessarily . . .*, JUDGES' J., Summer 1986, at 34, 37-38 (concluding that litigation has not increased generally, rather in only certain types of cases); Jack Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1909 (1989) (arguing that litigation explosion is "wrong as a matter of fact").

dockets lengthened by the growth of certain types of federal litigation,<sup>13</sup> such as complex racketeering trials and the prosecution of the "war on drugs."<sup>14</sup> Although the insufficient number of authorized judgeships has been remedied to some extent by the Federal Judgeship Act of 1990,<sup>15</sup> which created 85 new judgeships,<sup>16</sup> additional judgeships are still needed. No procedural reforms, however well-conceived and executed, can overcome delays created by a shortage of judges and the excessive caseloads burdening the current bench.

### I. THE CJRA'S PRINCIPLES AND TECHNIQUES FOR EXPENSE AND DELAY REDUCTION

The CJRA sets forth six principles and six techniques of litigation management to guide the district courts in developing their expense and delay reduction plans.<sup>17</sup> Although each of the district courts has discretion to develop an expense and delay reduction plan that addresses the individual needs of the district,<sup>18</sup> all districts are encouraged to at least consider, if not adopt, these principles and techniques.<sup>19</sup> When thoughtfully applied, these principles and techniques generally offer sound opportunities for expense and delay reduction.

Section 473(a) of the CJRA sets forth the six principles that Congress directed all districts to consider when developing their own expense and delay reduction plans.<sup>20</sup> While these principles should be considered by each of the districts when fashioning their plans, the plans of the ten pilot districts must actually implement these principles.<sup>21</sup> The six principles are: (1) differential manage-

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<sup>13</sup> See, e.g., CJRA REPORT, E. DIST. OF CAL., *supra* note 3, at 18-33; CJRA REPORT, N. DIST. OF IND., *supra* note 3, at 3-30; CJRA REPORT, E. DIST. OF PA., *supra* note 3, at 13-22; CJRA REPORT, DIST. OF V.I., *supra* note 3, at 4-7; CJRA REPORT, E. DIST. OF VA., *supra* note 3, at 2-15, 28-48.

<sup>14</sup> Williams, *supra* note 10, at 185 (noting that number of drug prosecutions have tripled in last decade).

<sup>15</sup> Pub. L. No. 101-650, 104 Stat. 5089 (1990).

<sup>16</sup> *Id.*

<sup>17</sup> See 28 U.S.C. § 473; see also S. REP. NO. 416, *supra* note 4, at 14-30, reprinted in 1990 U.S.C.C.A.N. at 6817-33 (discussing principles of plan).

<sup>18</sup> See 28 U.S.C. § 472.

<sup>19</sup> See *id.* § 473(a),(b).

<sup>20</sup> See *id.* § 473(a).

<sup>21</sup> See 28 U.S.C.A. § 471 ch. 23, at 765-67 (West 1993). The Judicial Conference of the United States designated ten pilot districts which are required to develop cost and delay plans that incorporate all six of the principles enumerated in § 473. *Id.* at 767. These plans are to remain in effect for at least three years. *Id.* The ten pilot districts

ment of cases depending on their complexity and the time needed to prepare for trial,<sup>22</sup> (2) early judicial intervention in cases, including the early setting of firm trial dates, which should typically be within eighteen months of the filing of the complaint,<sup>23</sup> (3) case management conferences that establish the scope of, and timing for, needed discovery,<sup>24</sup> (4) voluntary and cooperative methods of discovery,<sup>25</sup> (5) certification by counsel that a discovery motion is made only after good faith efforts have failed to resolve the discovery dispute,<sup>26</sup> and (6) active encouragement of alternative dispute resolution.<sup>27</sup>

Section 473(b) of the CJRA sets forth six techniques that each district court should consider using as tools for expense and delay reduction.<sup>28</sup> Similar to the principles, none of the federal districts is required to implement these techniques, but should consider them when fashioning plans for expense and delay reduction.<sup>29</sup> The six techniques are: (1) preparation of a discovery management plan by counsel for all parties at the initial pretrial conference,<sup>30</sup> (2) presence at pretrial conferences of counsel with authority to bind the parties on any matters identified for discussion by the court,<sup>31</sup> (3) signatures of both counsel and client on any requests for extensions of discovery deadlines and postponements of trial dates,<sup>32</sup> (4) submission to a neutral court representative for a non-

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are: Southern District of California, District of Delaware, Northern District of Georgia, Southern District of New York, Western District of Oklahoma, Eastern District of Pennsylvania, Western District of Tennessee, Southern District of Texas, District of Utah, and Eastern District of Wisconsin. JUDICIAL CONFERENCE OF THE U.S., CIVIL JUSTICE REFORM ACT REPORT: DEVELOPMENT AND IMPLEMENTATION OF PLANS BY EARLY IMPLEMENTATION DISTRICTS AND PILOT COURTS 1 (June 1, 1992). All of the 94 district courts must issue plans by December 1993. 28 U.S.C.A. § 471, ch. 23, at 766. Thirty-four districts, including the Eastern District of New York, developed plans by December 31, 1991. *See id.* Those districts are designated early implementation districts, which entitles them to additional funding, equipment, and personnel to aid in implementing their plans. *See id.*

<sup>22</sup> 28 U.S.C.A. § 473(a)(1).

<sup>23</sup> *Id.* § 473(a)(2).

<sup>24</sup> *Id.* § 473(a)(3).

<sup>25</sup> *Id.* § 473(a)(4).

<sup>26</sup> *Id.* § 473(a)(5).

<sup>27</sup> *Id.* § 473(a)(6).

<sup>28</sup> *Id.* § 473(b).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* § 473(b)(1).

<sup>31</sup> *Id.* § 473(b)(2).

<sup>32</sup> *Id.* § 473(b)(3). While the "technique" requiring both counsel and client to sign requests for extensions of discovery and postponements of trial dates may be well-intentioned, *see id.*, we question the wisdom of such a technique. Obviously, counsel

binding evaluation of the case,<sup>33</sup> (5) requirement that parties or their representatives be available for binding settlement discussions upon notice by the court,<sup>34</sup> and (6) authorization for each district to adopt other techniques that the district shall consider appropriate in view of the recommendations of the district's advisory group.<sup>35</sup>

For the most part, it is difficult to argue with the logic of the principles and techniques of the CJRA. The overriding goal of both the principles and techniques appears to be fostering litigation that is closely managed by the court and cooperative in spirit among the parties. The principles and techniques offer common sense approaches to minimize expense and delay. While these principles and techniques do impose some additional duties on courts and litigants, they appear reasonably calculated to achieve their goals. Thus, assuming a client's objective in a case is the prompt and efficient adjudication of the issues being litigated, clients should benefit from expense and delay reduction plans that conscientiously integrate the CJRA's principles and techniques.

We believe that four aspects of the principles and techniques are likely to have particularly significant impacts on clients. These are: (1) the use of case management conferences and plans to ensure close judicial control of all phases of a litigation,<sup>36</sup> (2) the early establishment of a firm trial date,<sup>37</sup> (3) the use of voluntary methods of discovery,<sup>38</sup> and (4) the active encouragement of settlement discussions and methods of alternative dispute resolution.<sup>39</sup> We discuss each of these matters below.

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should discuss such matters with the client. Failure to do so may indicate that the attorney-client relationship is not open and may be symptomatic of more serious attorney-client difficulties. Nonetheless, the need for joint signatures is likely to impose logistical burdens on both attorney and client, particularly when confronted with deadlines. If the court believes that counsel is requesting extensions which are neither authorized by the client nor in the client's best interests, the court has always had the power to deal with such situations (by directing counsel to communicate with the client or to bring the client into court) without requiring jointly signed documents in all cases.

<sup>33</sup> *Id.* § 473(b)(4).

<sup>34</sup> *Id.* § 473(b)(5).

<sup>35</sup> *Id.* § 473(b)(6).

<sup>36</sup> *Id.* § 473(a)(3).

<sup>37</sup> *Id.* § 473(a)(2)(B).

<sup>38</sup> *Id.* § 473(a)(4).

<sup>39</sup> *Id.* § 473(a)(6).



### A. Case Management Conferences and Case Management Plans

Case management plans, which are already widely used by many courts pursuant to Federal Rule 16,<sup>40</sup> can be utilized by the court and litigants to develop an appropriate schedule for all aspects of litigation from the earliest stages of a case. Active judicial management of the case should increase the likelihood that the litigation will proceed in a constructive and expeditious manner. By conducting a case management conference that addresses, among other things, the types of issues set forth in Rule 16, the court can help focus pretrial preparation and ensure that discovery is properly tailored to the needs of the case.<sup>41</sup>

Two of the techniques set forth in the CJRA seem especially well calculated to ensure that case management conferences are effective tools for expense and delay reduction. First, the preparation and submission of a joint discovery management plan requires that the parties themselves agree on and submit a discovery program to the court.<sup>42</sup> If the parties are able to jointly develop such a plan, it is likely that the plan will reflect their mutual assessment as to appropriate discovery for the case, and a realistic timetable to accomplish their goals.

Second, the requirement that counsel at pretrial conferences have authority to bind the parties as to any issue identified by the court<sup>43</sup> helps ensure that pretrial conferences will be meaningful. While the notion that counsel must have authority to bind clients at conferences with the court is hardly a new concept,<sup>44</sup> the adoption of this rule should ensure that pretrial conferences will not be hindered by counsel's lack of authority. A caveat to the foregoing is, however, that issues on which the parties are to be bound should be identified in advance. Courts cannot fairly expect parties and their counsel to have discussed and arrived at positions on all issues which might conceivably arise at a pretrial conference. In addition, it would be inefficient and unduly expensive and burdensome to require parties and their counsel to discuss a

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<sup>40</sup> See FED. R. CIV. P. 16.

<sup>41</sup> See FED. R. CIV. P. 16(a)(2) (setting forth objectives and goals of rule).

<sup>42</sup> 28 U.S.C. § 473(b)(1).

<sup>43</sup> *Id.* § 473(b)(2).

<sup>44</sup> See generally Shirley H. Buccieri & Trygve Thoreson, *Legal Ethics: Issues and Rules of Professional Responsibility*, in SIXTH ANNUAL INSTITUTE ON CORPORATE LAW DEPARTMENT MANAGEMENT, at 796 (PLI Corp. L. and Practice Course Handbook Series No. 265, 1992), available in WESTLAW, JLR Database (discussing attorney-client relationship and attorney's ability to bind client).

large number of issues in advance of each pretrial conference just in case the issues might be mentioned at the conference. Thus, the fair way to use this technique is to require counsel at pretrial conferences to have authority to bind the parties only as to issues identified as being in need of resolution in advance of the conference. Absent such advance notice, courts should permit counsel a reasonable opportunity to communicate with their clients about the matters on which the clients are to be bound.

Although some critics argue that the type of systematic and continuous case management contemplated by the CJRA places additional burdens on an already overburdened federal judiciary,<sup>45</sup> the careful management of cases should ultimately reduce judicial workloads. For instance, the development of a comprehensive and realistic case management plan may reduce the need for later judicial resolution of scheduling disputes. Judges may utilize case management conferences to resolve discovery disputes that could otherwise lead to needless motions, and to resolve some substantive issues, such as joinder of parties, without the need for motion practice. Moreover, by encouraging the differential management of cases, the CJRA should help ensure that the type of close judicial supervision contemplated by case management conferences does not place burdens on the court that outweigh the expected benefits. Clearly, the number and complexity of case management conferences needed for a particular case will vary depending on the nature of the case. A complex multi-defendant securities fraud case will typically require more judicial supervision than a simple breach of contract case involving two parties.

Although courts have followed the practice of tracking cases differently for years, the CJRA explicitly encourages the development of systems to track different types of cases.<sup>46</sup> As shown in Part II below, individual district courts are free to develop methods of differential case management that account for the needs of the particular district.<sup>47</sup> To the extent that plans for differential

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<sup>45</sup> See, e.g., *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 210-13 (1990) [hereinafter *Hearings*] (testimony of Judge Aubrey E. Robinson) (pointing to criminal docket, judicial vacancies, and need for new judgeships as factors burdening judiciary); Tobias, *supra* note 8, at 1395-97, 1402-03 (suggesting that CJRA will "enhance, and even may eclipse" existing problems faced by judiciary).

<sup>46</sup> 28 U.S.C. § 473(a)(1).

<sup>47</sup> The districts vary substantially in the specific number of particular types of cases which they must adjudicate. For example, a district containing several large prisons will have more habeas corpus cases than a district with no prisons. Although

case management are left to the individual districts, each district can develop an approach to case management conferences that best serves its needs.<sup>48</sup>

If case management conferences are used by courts and litigants to focus the issues and activity in a case, the conferences will prove useful. At a conference, the court may enter a scheduling order that indicates the schedule by which amendment of pleadings, joinder of parties, motions, and discovery must be completed.

From the client's perspective, it is generally desirable that the individual judge determine the use to be made of case management conferences and plans. To a judge who has not made active use of case management conferences and plans in the past and is opposed to doing so, it is unlikely the conferences and plans will prove useful. Instead, they will likely become merely perfunctory steps that cost litigants more time and expense than they are worth. To the extent individual judges have developed different approaches to case management that they choose not to discard, the CJRA reforms should not be permitted to become counter productive "make work" for the court, counsel, or litigants.

### B. *The Setting of Firm Trial Dates*

The establishment of a firm trial date at an early stage of the litigation is an important provision of the CJRA.<sup>49</sup> By scheduling a firm trial date soon after a case commences, the court and liti-

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it may not be necessary to allocate a separate case management category specifically to habeas corpus cases, at the very least, those cases should not be placed in the same category as a highly complex securities case or RICO litigation.

<sup>48</sup> Potentially, the development of different plans by all 94 districts may burden counsel and clients who will have to familiarize themselves with a host of procedural rules evolving from different expense and delay reduction plans in various districts. See Tobias, *supra* note 8, at 1422-24. This is a burden resulting from the substantial autonomy necessary for each district to develop a meaningful plan which suits the particular needs of the district. This burden is further increased by the revisions expected to result from the success or failure of the early use of the plans. On balance, however, it is expected, or at least hoped, that the plans will prove sufficiently helpful to warrant this burden. In any event, permitting local autonomy is politically astute because it increases the likelihood that individual districts will support, rather than resist, these reforms and will develop a commitment to the individual plans they worked to develop. But see *id.* at 1426-27 (citing district judge who criticizes CJRA as encouraging district shopping). Professor Tobias further suggests that "[c]itizens lose respect for the civil justice system when they believe that the procedures available, or the character of justice, vary significantly from district to district." *Id.* at 1427.

<sup>49</sup> 28 U.S.C. § 473(a)(2)(B).

gants are compelled to develop a realistic and presumably prompt timetable for completion of the pretrial phase.

Because the trial date will typically be set for eighteen months after the date the complaint is filed,<sup>50</sup> litigants will be required to prosecute their claims and prepare their defenses in a timely and expeditious manner. In view of the tendency to expand work to fill whatever time is available to complete the litigation, a compressed litigation timetable will probably result in more efficient preparation for trial. The fact that a case must routinely be prepared for trial in eighteen months may help reduce the many "fits and starts" that can so often cause litigation costs to soar. A compressed timetable may force the parties to address and efficiently resolve important issues, such as amendment of pleadings and joinder of additional parties, that are often deferred until later in the case. At this later date, resolution of these issues may lead to further inefficiencies and delay because of the need to conduct additional discovery.

For the most part, if litigation moves at a faster pace, it will probably be less expensive. Pressure to keep the case moving may force the parties to be more selective when choosing the discovery that they seek and forego discovery that is of marginal significance to the case.<sup>51</sup> As a practical matter, the compressed timetable may help reduce the potential costs to a client that are so often caused by turnover of the lawyers handling a case.

It is important from the client's perspective that courts adhere to the trial dates that they have established. We recognize that judges have many different responsibilities which frequently conflict and impose intolerable burdens. For example, district courts are statutorily required to give priority to criminal cases, thus wreaking havoc with the scheduling and completion of civil trials,<sup>52</sup> and potentially increasing one of the largest litigation expenses for clients, the final preparation for trial. All too frequently, clients and their counsel prepare fully for trial only to find at the last moment that an adjournment is necessary. Inevitably, both clients and counsel are either required, or at least feel

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<sup>50</sup> SDNY PLAN, *supra* note 12, at 4.

<sup>51</sup> See S. REP. NO. 416, *supra* note 4, at 24-25, reprinted in 1990 U.S.C.C.A.N. 6827-28.

<sup>52</sup> See 18 U.S.C. §§ 3161-3174; see also Charles B. Renfrew, *The Problem of Docket Control: A Response to "Reassessing the Allocation of Judicial Business Between State and Federal Courts,"* 78 VA. L. REV. 1833, 1837 (1992) (commenting on speedy trial requirement and impact on court dockets).

compelled, to repeat much of the same effort when preparing for the next trial date. Adhering to trial dates whenever possible helps alleviate these expensive problems.

While it is conceivable that the establishment of a firm trial date at an early stage of a case may sometimes force litigants to proceed in ways which they may not otherwise choose, the benefits of an early trial date probably outweigh any disadvantages. The establishment of a trial date may help ensure that discovery and motion practice do not take on lives of their own. Notwithstanding the real benefit to be gained by a compressed litigation timetable, the court should, under any plan, have discretion to control the case in whatever manner and on whatever timetable the court deems appropriate in view of the needs of the litigants.

Obviously, there are many instances in which the court and parties may be well served by a slower timetable. For instance, if there are genuine and active settlement discussions taking place from the outset of a case, the court may decide to give the parties time to continue their discussions without the pressure and expense of discovery deadlines or a trial date. If all of the parties are willing to accept this delay, then presumably the court should not object to it. To force both the court and the litigants to address the merits of the case when settlement discussions are proceeding can prove to be a waste of time if the case settles, and may even impede the ongoing settlement discussions if the discovery process causes the development of a more adversarial relationship among the parties. Similarly, where a case may have been brought primarily to avoid a statute of limitations bar, the judge should be able to control the timetable in any manner that is appropriate. Finally, a complex case that will actually take longer to prepare for trial than the eighteen months targeted in the CJRA should not be compressed into an unrealistic timetable.

### C. *Voluntary Discovery*

One of the most controversial principles of the CJRA is the encouragement of voluntary discovery.<sup>53</sup> Although the CJRA does

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<sup>53</sup> CJRA § 473(a)(4) requires each district to encourage more "cost-effective discovery through [the] voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices." 28 U.S.C. § 473(a)(4); see *Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 441, 445-46 (1992) ("'Rambo'-style discovery can hinder or prevent litigation parties from getting to the heart of the important contested issues."); Mary Brigid McManamon, *Is the Recent Frenzy of Civil Justice Reform a Cure-All or a Placebo? An*

not detail the nature of the voluntary discovery to be used,<sup>54</sup> the inclusion of this principle appears to be a response to the widespread perception that discovery is excessive in American litigation.<sup>55</sup> Evidently believing that some of the expense and delay of discovery can be reduced by each litigant's automatic disclosure of some information without a formal request, the CJRA drafters directed district courts to consider this concept when fashioning their plans.<sup>56</sup>

The issue of voluntary discovery is perhaps the most difficult one raised by the CJRA. Because this idea is contrary to the discovery process that has evolved in our adversarial system, it is difficult to anticipate how voluntary discovery will work.<sup>57</sup> Many critics of the CJRA argue that voluntary discovery will undermine some of the benefits of the adversarial system, increase the burden of discovery, and result in even more discovery disputes among counsel who may differ as to what documents must be voluntarily produced.<sup>58</sup> Some critics have also argued that some ex-

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*Examination of the Plans of Two Pilot Districts*, 11 REV. LITIG. 329, 352 (1991) (noting District of Delaware recommendation that certain information be provided with initial pleading in personal injury cases). Each court must consider, and may adopt, the 11 principles, guidelines, and techniques, 28 U.S.C. § 473(a)(6) and "such other features as the district court considers appropriate." *Id.* § 473(b)(6).

<sup>54</sup> See McManamon, *supra* note 53, at 335. While the Act contains several guidelines and techniques of litigation management for the courts and their advisory groups to consider, districts are divided in their support of the requirement of voluntary discovery. Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139, 144-45 (1993) (discussing differences in plans).

<sup>55</sup> See Jeffrey J. Mayer, *Prescribing Cooperation: The Mandatory Pretrial Disclosure Requirement of Proposed Rules 26 and 37 of the Federal Rules of Civil Procedure*, 12 REV. LITIG. 77, 83-91 (1992) (analyzing discovery abuse and excessive use in litigation). A survey of litigators and federal trial judges revealed that a substantial majority of those surveyed perceived that abuse of the discovery process was the cause of high litigation costs. See Peck, *supra* note 8, at 107-08. The most frequently cited abuses were the "over-discovery" of cases and "the use of discovery as an adversarial tool to raise the stakes for their opponents." *Id.*; see S. REP. NO. 416, *supra* note 4, at 25, reprinted in 1990 U.S.C.C.A.N. at 6824 ("[D]iscovery costs constitute a higher percentage of total transaction costs than any other category of costs incurred."); Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 8-11 (1992) (noting criticisms of discovery system).

<sup>56</sup> See *supra* note 53-54; *infra* note 58-60 and accompanying text (noting controversy surrounding automatic disclosure requirement); Tobias, *supra* note 54, at 144.

<sup>57</sup> See Mayer, *supra* note 55, at 91-95 (comparing mandatory disclosure and discovery systems).

<sup>58</sup> See Bell et al., *supra* note 55, at 5, 30 n.111 (asserting that "voluntary disclosure" will not reduce cost of litigation).

pense and delay reduction plans have adopted voluntary disclosure provisions that are contrary to Federal Rules 16 and 26.<sup>59</sup>

Each of these criticisms has a measure of validity. To the extent counsel must voluntarily produce documents that may hurt a client's case, voluntary discovery may undermine the attorney-client relationship and lead clients to screen the documents they give to counsel. Further, because many cases terminate before the parties commence discovery, the imposition of automatic timetables for document disclosure may force parties to undertake discovery that would otherwise be unnecessary. To the extent that counsel acting in good faith have different understandings of what documents must be produced, the voluntary disclosure rules could lead to costly and lengthy disputes. Moreover, some districts may require parties to produce documents which support the pleadings, perhaps encouraging counsel to draft pleadings vaguely so as to avoid production or to obfuscate the use which counsel intends to make of the documents at trial.

These genuine concerns should be addressed on a case-by-case basis. However, it may prove both economical and efficient in many cases for litigants to be required, shortly after commencement of a case, to exchange certain basic information, such as the names and addresses of principal witnesses, the existence of material agreements signed by the parties, or the existence of any relevant insurance policies. Voluntary disclosure regarding basic information and documents raises relatively few troubling questions because competent counsel will routinely request this information during the early stages of a case.

We believe, however, that the broader use of voluntary discovery should be undertaken cautiously and on a trial basis. Disclosure rules that require production of all documents that tend to support the allegations in a pleading may be so broad as to invite many disputes as to which documents must be produced. Efforts should be made by the districts to avoid uncertainty in this area by defining the categories of documents to be produced as clearly as possible.

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<sup>59</sup> See Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 51 (1992); FED. R. CIV. P. 16, 26. But see S. REP. NO. 416, *supra* note 4, at 55, reprinted in 1990 U.S.C.C.A.N. at 6844. According to the Senate Report, § 473(a)(2)(C) "is intended to supplement the authority to limit discovery currently provided" for by Rule 26. *Id.*

As set forth in subpart II(B) below, both the Southern and Eastern Districts of New York have initiated programs of voluntary discovery that bear scrutiny.<sup>60</sup> However, any meaningful assessment of whether the benefits of these voluntary disclosure plans will outweigh the difficulties inherent in voluntary discovery is premature. Moreover, under any expense and delay reduction plan, litigants and the court should be able to dispense with such voluntary disclosure if it is deemed inappropriate.<sup>61</sup>

#### D. Settlement and Alternative Dispute Resolution ("ADR")

The emphasis in the CJRA on settlement opportunities<sup>62</sup> and encouragement of methods of alternative dispute resolution<sup>63</sup> should be especially welcomed by clients. If the principles and techniques of the CJRA foster opportunities for settlement discussion, then litigants are more likely to maintain a dialogue. While such discussions will not result in the settlement of all cases, and may even harden positions, the explicit discussion of settlement options can prove beneficial to clients in many cases.

One of the greatest impediments to the commencement of meaningful settlement discussions in many cases is the concern that the party initiating the discussion will be perceived as weak, uncertain about the outcome, or lacking in resources or commitment to try the case. As a result, the parties in many cases engage in an elaborate game of posturing when they really should be confronting the issue of settlement. Any reforms which compel parties to discuss settlement sooner and more frequently should improve the current situation.

Two of the techniques set forth in 28 U.S.C. § 473(b), the early, neutral evaluation of cases<sup>64</sup> and the requirement that law-

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<sup>60</sup> EDNY PLAN, *supra* note 3, at 4-5; SDNY PLAN, *supra* note 12, at 2. The Eastern and Southern Districts' provisions for automatic disclosure prior to discovery require an additional layer of procedure. See George F. Hritz, *Plan Will Increase Cost, Delay Outcomes*, N.Y. L.J., Apr. 13, 1993, at 2. Critics argue that this layer comes too early in a case, increases cost and delay, generates additional motion practice, and encourages procedural gamesmanship and forum shopping. *Id.*

<sup>61</sup> See S. REP. NO. 416, *supra* note 4, at 53, 55, reprinted in 1990 U.S.C.C.A.N. at 6844-45 (suggesting that principles of litigation management are intended to be "flexible"). Section 473(a)(3) "requires careful and deliberate monitoring, through a discovery-case management conference or series of conferences, of all cases that the court . . . determines are complex . . . or appropriate." *Id.* at 55.

<sup>62</sup> See 28 U.S.C. § 473(b)(2), (4), and (5) (Supp. 1992) (describing settlement opportunities that districts must consider in adopting their plans).

<sup>63</sup> *Id.* § 473(a)(6).

<sup>64</sup> *Id.* § 473(b)(4).



yers with the power to bind the parties be present at settlement conferences,<sup>65</sup> seem well calculated to promote settlements.

A neutral evaluation allows litigants to learn from a knowledgeable and disinterested evaluator how the case may later be perceived by the actual trier of fact. Even though such a nonbinding evaluation is not conclusive and can be ignored by the parties, it should serve as a reality check for counsel and client and help the client assess the worth of the case. In essence, the neutral evaluation acts to give clients a different perspective of the litigation so that they can objectively consider how the facts will be evaluated at trial. This may lead to revisions of trial expectations or settlement offers and demands. It should be noted, however, that the neutral evaluation effort may be quite involved and expensive depending on the nature of the presentations to the evaluator.

The CJRA principles and techniques seek to foster cooperation among counsel, such as the joint preparation of a discovery plan<sup>66</sup> and voluntary disclosure of some information.<sup>67</sup> A good working relationship among counsel will almost certainly promote more meaningful settlement discussions in appropriate cases.

Not only the the early evaluation of cases, but also requiring the presence or availability of representatives of the parties with authority to bind them in settlement discussions is designed to promote settlement. Although we agree that it is reasonable to require attorneys with settlement authority to be present upon proper notice, we do not believe that courts should routinely require the parties themselves to attend these conferences. While some settlements may result if the parties are required to meet

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The centerpiece of [early neutral evaluation] is a confidential, nonbinding case evaluation conference, attended by all counsel and their clients, and hosted by a neutral member of the private bar who has substantial litigation experience and who is an expert in the principal subject matter of the lawsuit. This conference takes place early in the pretrial period so that the parties will be in a position to use . . . the proceeding to make case development and settlement processes more rational, less expensive and less time-consuming.

See S. REP. NO. 416, *supra* note 4, at 29-30, *reprinted in* 1990 U.S.C.C.A.N. at 6832-33.

<sup>65</sup> 28 U.S.C. § 473(b)(5). The CJRA describes this technique as "a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference . . . ." *Id.*

<sup>66</sup> *Id.* § 473(b)(1).

<sup>67</sup> *Id.* § 473(a)(4).

with the judge, in the majority of cases such attendance is burdensome and unnecessary. Further, by requiring the attendance of parties, the court communicates to clients that it does not trust their counsel to conduct settlement discussions fairly and competently. In most cases, this message is inappropriate.

The CJRA's focus on and encouragement of the many available ADR methods should also prove useful to clients. In almost all cases, clients should at least consider the use of ADR in order to reach a faster and more economical resolution of a dispute.<sup>68</sup> Several well-regarded private adjudication firms offer litigants the opportunity for competent, nonjudicial resolution of disputes, often by respected former judges.<sup>69</sup> Guided by ADR experts, the parties can then devise virtually any approach to settlement or adjudication that they deem appropriate.<sup>70</sup> Currently, ADR is moving toward the forefront of American dispute resolution, and attorneys should advise their clients to consider its benefits.<sup>71</sup>

## II. EXPENSE AND DELAY REDUCTION IN THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

Both the Southern and Eastern Districts of New York have adopted expense and delay reduction plans that may offer substantial benefits to clients.<sup>72</sup> The Southern District of New York is one of the ten pilot districts designated by the Judicial Conference of the United States;<sup>73</sup> the Eastern District of New York has

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<sup>68</sup> See Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990). The Administrative Dispute Resolution Act, which expires on October 1, 1995, *id.* § 6(a), § 606(e), requires every federal agency to develop ADR policies, *id.* § 3(a), authorizes the use of ADR by federal agencies, *id.*, and requires agency training in ADR methods. *Id.* § 3(c). In addition, the Act authorizes agencies to consider the inclusion of ADR provisions in their standard contracts. *Id.* § 3(d)(1); see Anne C. Morgan, Note, *Thwarting Judicial Power to Order Summary Jury Trials in Federal District Court: Strandell v. Jackson County*, 40 CASE W. RES. L. REV. 491, 492-96 (1990). Federal district court judges increasingly utilize alternative dispute resolution techniques to reduce delay and clear congested dockets. *Id.*; see S. REP. NO. 416, *supra* note 4, at 28, reprinted in 1990 U.S.C.C.A.N. at 6830-34 (supporting use of summary jury trial, mediation, mini-trial, and early neutral evaluation). But see Dayton, *supra* note 12, at 915 (asserting that claims concerning ADR's potential to reduce costs and delays are greatly exaggerated).

<sup>69</sup> Lis Wiehl, *Private Justice for a Fee: Profits and Problems*, N.Y. TIMES, Feb. 17, 1989, at B5.

<sup>70</sup> See S. REP. NO. 416, *supra* note 4, at 27-28, reprinted in 1990 U.S.C.C.A.N. at 6830-31.

<sup>71</sup> See McManamon, *supra* note 53, at 329; *supra* note 68 and accompanying text.

<sup>72</sup> EDNY PLAN, *supra* note 3; SDNY PLAN, *supra* note 12.

<sup>73</sup> See *supra* note 21 (listing pilot districts).

opted to become an Early Implementation District.<sup>74</sup> We have focused on these two plans for a number of reasons. Although they differ in many respects,<sup>75</sup> both plans contain provisions that may promote economical and prompt resolution of disputes.<sup>76</sup> In addition, both plans evince a bold willingness to experiment to improve the litigation process. Both plans reflect the extensive time, effort, and thought devoted to them by their distinguished authors. Finally, these two are extraordinarily busy and district courts handle a wide variety of cases.<sup>77</sup> Accordingly, reforms which are successful in these districts should have a fair chance of success in other districts.

The plans for the Southern District of New York ("SDNY Plan") and Eastern District of New York ("EDNY Plan") recognize that CJRA expense and delay reduction plans should not limit judicial discretion in the management of cases.<sup>78</sup> The *Guide to the Southern District of New York Civil Justice Expense and Delay Reduction Plan* ("SDNY Guide") expressly states that "neither this Guide nor the Plan vests any additional rights in lawyers or litigants; final discretion as to the matters discussed here remains with the individual judge."<sup>79</sup> Similarly, the EDNY Plan states that "[f]or cause shown, any judicial officer may in any case modify or suspend the operation of any one or more or all of the provisions of this Plan."<sup>80</sup>

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<sup>74</sup> See Tobias, *supra* note 59, at 56.

<sup>75</sup> See Gerard P. Lepp, *Arbitration in Federal Courts, Eastern District of New York*, in HOW TO HANDLE ARBITRATION IN NEW YORK STATE AND FEDERAL COURTS, at 49 (PLI Litig. and Admin. Practice Course Handbook Series No. 458, 1993) available in WESTLAW, JLR Database (comparing alternative dispute resolution programs of two plans).

<sup>76</sup> See S. REP. NO. 416, *supra* note 4, at 25, reprinted in 1990 U.S.C.C.A.N. at 6828. Senator Joseph Biden, Chairman of the Judiciary Committee, noted the evils the CJRA attempts to remedy: "High costs and excessive delay do combine to forestall the deliberate and prompt adjudication of disputes. And they do combine to ration commodities that a democracy should never ration—fairness, justice, and access to the courts." *Id.* at 8.

<sup>77</sup> See ADVISORY GROUP OF THE U.S. DIST. CT. FOR THE E. DIST. OF N.Y., FINAL REPORT TO HON. THOMAS C. PLATT, CHIEF JUDGE, 142 F.R.D. 185, 228-33 (1991) (detailing growth and burdens of complex litigation in Eastern District) [hereinafter EDNY FINAL REPORT].

<sup>78</sup> EDNY PLAN, *supra* note 3, at 1; SDNY PLAN, *supra* note 12, at 4.

<sup>79</sup> GUIDE TO THE SOUTHERN DISTRICT OF NEW YORK CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 1 (1993) [hereinafter SDNY GUIDE].

<sup>80</sup> EDNY PLAN, *supra* note 3, at 1.

There is little question that judges should be able to control a case as they deem appropriate.<sup>81</sup> If a judge believes a provision of the plan should not apply to a particular case, the judge should have the discretion to deviate from the plan. By permitting the exercise of sound judicial discretion, both the Southern and Eastern District plans undercut some of the strongest fears initially expressed concerning the CJRA: (1) that it would transform the complex and intellectually demanding litigation process into a factory assembly line; and (2) that it would require judges preparing cases for trial to act as technicians applying mechanistic "cookie cutter" procedures rather than as sophisticated litigation managers.<sup>82</sup>

Although a complete review of the SDNY Plan and the EDNY Plan is beyond the scope of this Article, we have focused on various aspects of the plans that have potential significance to clients. These provisions pertain to: (1) differential case management, case management conferences, and the establishment of trial dates;<sup>83</sup> (2) automatic disclosure and limitations on discovery;<sup>84</sup> (3) motion practice;<sup>85</sup> and (4) use of ADR.<sup>86</sup> An understanding of how the two plans approach these areas should aid clients during litigation. Although there may be some features of each plan that clients will dislike, or about which judgment should be reserved

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<sup>81</sup> See Fed. Judicial Ctr., *Implementation of the Civil Justice Reform Act of 1990*, in SIGNIFICANT DEVELOPMENTS IN FEDERAL CIVIL PRACTICE AND PROCEDURE: 1990-91 LEGISLATIVE AND RULE-MAKING CHANGES 167 (ALI-ABA Video Law Review Study, 1991), available in WESTLAW, JLR Database (detailing memorandum sent to all chief judges of United States district courts as assistance in implementation of CJRA). The Federal Judicial Center notes that differential case management, as espoused by the CJRA, "is characterized by flexibility and necessarily involves the exercise of judicial discretion in its implementation." *Id.* at 182.

<sup>82</sup> See Robert L. Haig, *Judicial Vacancies and Procedural Reform*, N.Y. L.J., June 15, 1992, at 2 (noting that judges and lawyers are likely to object to loss of flexibility which may result from new procedures); see also Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155, 165 (1991). Mengler states that "[a] sounder approach . . . is to put down the rule making pen and to provide the necessary resources to manage formal discovery effectively." *Id.* He suggests abolishing diversity jurisdiction and providing additional Article III and magistrate judges. *Id.*

<sup>83</sup> See *infra* subpart II(A).

<sup>84</sup> See *infra* subpart II(B).

<sup>85</sup> See *infra* subpart II(C).

<sup>86</sup> See *infra* subpart II(D).

until the operation of the plan is clarified, each plan contains features that should reduce the cost and delay of civil litigation.<sup>87</sup>

A. *Differential Case Management, Case Management Conferences, and the Establishment of Trial Dates*

The SDNY Plan and the EDNY Plan adopt different approaches to differential case management and case management conferences.<sup>88</sup> While the Southern District created a differential case management system based upon the level of the complexity of a case,<sup>89</sup> the Eastern District declined to adopt a formal system of differential case management. Instead, the Eastern District opted to retain, without revision, its present system.<sup>90</sup> Under the SDNY Plan, each case is designated as expedited, standard, or complex depending on the complexity of the legal and factual issues in the case.<sup>91</sup> If the parties cannot agree on a designation, the designation is made by the judge based on Case Information Statements filed by the parties or following discussion during the initial case management conference.<sup>92</sup> The *SDNY Guide* states that there should be no motion practice concerning these categories and urges judges not to develop a jurisprudence concerning these classifications.<sup>93</sup>

An expedited case is a case involving no more than two depositions by each party, a relatively small number of clear-cut documents, little anticipated use of interrogatories, and little or no motion practice.<sup>94</sup> An expedited case should be ready for trial no later than one year after the answer is filed and should require little judicial supervision of pretrial activity.<sup>95</sup> A standard case is one that the parties do not believe can be tried within a year, but that does not involve an unusually large number of parties, complex issues, or a large number of anticipated discovery disputes or

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<sup>87</sup> See Carl Tobias, *Speeding Cases, Slowing Justice*, THE RECORDER, Aug. 4, 1992, at 7 ("Indeed, a number of specific procedures promise to reduce expense and delay in civil litigation."). However, when examining expense and delay reduction plans, Tobias also warns that "many provisions in the plans could have the opposite effects, increasing costs and delaying rather than speeding the process of justice." *Id.*

<sup>88</sup> See *infra* notes 89-114 and accompanying text.

<sup>89</sup> See SDNY PLAN, *supra* note 12, at 2.

<sup>90</sup> See EDNY PLAN, *supra* note 3, at 2.

<sup>91</sup> See SDNY PLAN, *supra* note 12, at 2.

<sup>92</sup> SDNY GUIDE, *supra* note 79, at 2-4.

<sup>93</sup> SDNY GUIDE, *supra* note 79, at 1.

<sup>94</sup> SDNY GUIDE, *supra* note 79, at 2.

<sup>95</sup> SDNY GUIDE, *supra* note 79, at 2.

motions.<sup>96</sup> A complex case is one involving a more complex procedural structure, a large number of parties, difficult substantive claims, a broad range of discovery, and the likelihood of a number of pretrial motions.<sup>97</sup> For cases that are designated as standard or complex, trials are generally to be set no later than eighteen months after filing of the complaint.<sup>98</sup>

Although the EDNY Plan does not adopt a formal system of differential case management for all cases,<sup>99</sup> as does the SDNY Plan, the Eastern District continues its differential management of social security and habeas corpus cases and its special treatment rules for complex cases.<sup>100</sup> The EDNY Plan also continues a program of mandatory, nonbinding arbitration for all claims for money damages involving \$100,000 or less except those involving social security, tax matters, prisoner's rights, and constitutional rights.<sup>101</sup> The EDNY Plan expressly leaves the setting of trial dates to the discretion of the judicial officer and declines to set specific target dates for trial.<sup>102</sup>

Clients with smaller claims brought in either district may especially benefit from the plans. The SDNY Plan demonstrates its commitment to reducing delay in expedited cases by requiring a trial date to be set within one year of the filing of the complaint.<sup>103</sup> In the Eastern District, the use of mandatory nonbinding arbitration in cases under \$100,000 means that such cases will be expeditiously directed to a nonfinal determination, which may only be appealed if the loser is prepared to risk responsibility for the arbitrator's fees.<sup>104</sup> Both plans thus address the concern of many liti-

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<sup>96</sup> SDNY GUIDE, *supra* note 79, at 4.

<sup>97</sup> SDNY GUIDE, *supra* note 79, at 3.

<sup>98</sup> SDNY PLAN, *supra* note 12, at 4; see Diane E. Murphy, *The Concerns of Federal Judges*, 74 JUDICATURE 112 (1990). Murphy states, in opposition to the setting of firm trial dates, that "[t]he requirement that trials are to occur within 18 months, absent special certification, establishes an expectation that cannot be fulfilled at the present time in many districts, primarily due to the volume and length of criminal trials." *Id.* at 114. Further, setting impossible targets, she states, could "thereby mislead litigants, the bar and the public." *Id.*

<sup>99</sup> EDNY PLAN, *supra* note 3, at 2 (adopting "no revision" of present system).

<sup>100</sup> EDNY PLAN, *supra* note 3, at 2-3 (determining special treatment "according to the needs of the particular case").

<sup>101</sup> EDNY PLAN, *supra* note 3, at 2-3; see *infra* notes 165-66 and accompanying text.

<sup>102</sup> EDNY PLAN, *supra* note 3, at 3-4.

<sup>103</sup> SDNY PLAN, *supra* note 12, at 2.

<sup>104</sup> EDNY PLAN, *supra* note 3, at 15. It should be noted, however, that a party will not be liable for arbitrators' fees if permission was granted *in forma pauperis*. *Id.*

gants in smaller cases that the price of justice often exceeds the value of the suit. By offering new approaches to smaller cases, the plans attempt meaningful reform.<sup>105</sup>

Both the SDNY and EDNY Plans adopt vigorous use of case management conferences. Under the SDNY Plan, in all cases an initial pretrial conference must be held within 120 days of the filing of the complaint.<sup>106</sup> For an expedited case, the conference will involve the automatic production of relevant documents, the limitation of discovery procedures, and the establishment of a trial date.<sup>107</sup> For any standard or complex case, the SDNY Plan requires the preparation of a case management plan that delineates the issues and includes a schedule of pretrial conferences and discovery.<sup>108</sup> It also encourages subsequent, systematic conferences as the court deems necessary.<sup>109</sup> In the event that a standard or complex case has not been tried within eighteen months, a case management conference should be held to set dates for completion of discovery and trial.<sup>110</sup>

The EDNY Plan mandates both an initial case management conference and a final pretrial conference.<sup>111</sup> The court also has discretion to schedule interim pretrial conferences as needed.<sup>112</sup> In complex cases, the EDNY Plan further requires a status conference every six months.<sup>113</sup> Although the EDNY Plan sets no firm dates for these conferences, it details a lengthy agenda of issues to be discussed at such conferences.<sup>114</sup>

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<sup>105</sup> While the EDNY Plan does not adopt the establishment of a firm trial date as in the Southern District, it does offer incentives to receive an early and firm trial date if all parties request or consent to a referral to a magistrate judge. By accepting a referral to a magistrate judge, litigants will generally receive an earlier trial date than they might otherwise obtain. EDNY PLAN, *supra* note 3, at 21. In addition, under the EDNY Plan, if a trial-ready case is not reached by the assigned judge after a reasonable time, but in no event more than six months, the parties may request a conference with the clerk, who will determine whether another judge may be assigned on one or two days notice. *Id.* at 3. The Southern District also has a reassignment procedure for trial-ready cases. SDNY GUIDE, *supra* note 79, at 14.

<sup>106</sup> SDNY PLAN, *supra* note 12, at 2.

<sup>107</sup> SDNY PLAN, *supra* note 12, at 2.

<sup>108</sup> SDNY PLAN, *supra* note 12, at 3; *see* FED. R. CIV. P. 16, 26(b).

<sup>109</sup> SDNY PLAN, *supra* note 12, at 3.

<sup>110</sup> SDNY GUIDE, *supra* note 79, at 7.

<sup>111</sup> EDNY PLAN, *supra* note 3, at 10.

<sup>112</sup> EDNY PLAN, *supra* note 3, at 10.

<sup>113</sup> EDNY PLAN, *supra* note 3, at 14 (stating that "[i]n complex cases, it is generally desirable for the court to exercise greater hands-on control of the litigation than in non-complex cases").

<sup>114</sup> EDNY PLAN, *supra* note 3, at 10-13.

By utilizing case management to refine the issues in a case and to set dates for completion of discovery, amendment of pleadings, and motion practice, both the SDNY Plan and the EDNY Plan should limit some of the potential sources of delay in litigation.<sup>115</sup> Even if counsel and client must undertake substantial preparation to address the issues to be discussed at these conferences, the possible resolution of various issues without the expense and delay of motion practice should prove extremely beneficial to the client.

Moreover, the continued substantial use of magistrate judges, which is contemplated by both plans,<sup>116</sup> may help ensure the productivity of pretrial conferences. Magistrate judges frequently have more time, and in some cases, more patience and greater inclination than district judges, to devote the painstaking attention to detail which is often necessary to make pretrial conferences successful.<sup>117</sup> Under both plans, magistrate judges may be assigned to develop case management plans and supervise pretrial activity, as well as engage in other activities designed to expedite litigation.<sup>118</sup>

#### *B. Automatic Disclosure and Limitations on Discovery*

A central tenet of CJRA reform is that litigants should not devote time and money to excessive and expensive pretrial practice.<sup>119</sup> As set forth above, a case management conference can be used to develop, either consensually or by judicial direction, a reasonable discovery program.<sup>120</sup> In addition, the SDNY Plan and

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<sup>115</sup> See S. REP. NO. 416, *supra* note 4, at 25, reprinted in 1990 U.S.C.C.A.N. at 6828. The Judiciary Committee cited an interim report which found that jurisdictions participating in pilot programs with case management controls "have experienced a significant reduction in processing time for cases included in the program and have increased court efficiency, as evidenced by their disposition of a greater number of cases in a shorter period of time without increased resources." *Id.*

<sup>116</sup> EDNY PLAN, *supra* note 3, at 1-2; SDNY PLAN, *supra* note 12, at 3.

<sup>117</sup> EDNY FINAL REPORT, *supra* note 77, at 249-50 (recommending increased use of magistrate judges to alleviate time pressures on district judges).

<sup>118</sup> EDNY STANDING ORDER ON EFFECTIVE DISCOVERY IN CIVIL CASES No. 4; SDNY PLAN, *supra* note 12, at 3.

<sup>119</sup> See S. REP. NO. 416, *supra* note 4, at 20-22, reprinted in 1990 U.S.C.C.A.N. at 6823. The Judiciary Committee identified discovery abuses as a principal cause of high litigation costs and noted that in many cases, economics and not the merits of the case, govern discovery decisions. *Id.*

<sup>120</sup> See EDNY PLAN, *supra* note 3, at 10-14; SDNY GUIDE, *supra* note 79, at 5-7; SDNY PLAN, *supra* note 12, at 3.



the EDNY Plan impose some voluntary disclosure rules and place limits on certain discovery practices.<sup>121</sup>

The SDNY Plan mandates automatic disclosure of all documents relevant to the subject matter of the pleadings in any case that is designated as "expedited."<sup>122</sup> Within twenty-one days of such designation, the plaintiff must serve the defendant with copies of all documents relevant to the subject matter of the complaint.<sup>123</sup> Within twenty-one days of receiving this material, the defendant must serve the plaintiff with all documents that are relevant to the subject matter of the answer.<sup>124</sup> A document is relevant if it supports, contradicts, or otherwise makes less probable the material averments of the pleading.<sup>125</sup> Although the SDNY Plan states that discovery will be limited in expedited cases, it does not articulate any limitations.<sup>126</sup> In standard and complex cases, the case management conference is coordinated with the requirement of mandatory disclosure. At the conference, the parties may be required to identify persons with knowledge of the dispute and those in possession of relevant documents.<sup>127</sup>

Under the EDNY Plan, certain disclosure is required in all civil cases filed on or after February 1, 1992, except social security, habeas corpus, pro se, and certain civil rights cases.<sup>128</sup> Within thirty days after service of the answer or a written demand, a party *must* disclose: (1) the identity of persons with information concerning the claims, defenses, and damages, (2) a general description of all documents in the party's custody and control that bear on claims and defenses, and (3) documents that were used to prepare pleadings or are expected to be used to support the allegations of the pleading.<sup>129</sup> In addition, authorizations to obtain medical, hospital, no-fault, and workers' compensation records must be provided, as well as the contents of any insurance agreement.<sup>130</sup> In addition to these mandatory disclosures, the EDNY Plan limits, in the absence of an agreement among the parties or a

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<sup>121</sup> EDNY PLAN, *supra* note 3, at 4-7; SDNY PLAN, *supra* note 12, at 2-3.

<sup>122</sup> SDNY GUIDE, *supra* note 79, at 11.

<sup>123</sup> SDNY GUIDE, *supra* note 79, at 11.

<sup>124</sup> SDNY GUIDE, *supra* note 79, at 11.

<sup>125</sup> SDNY GUIDE, *supra* note 79, at 11.

<sup>126</sup> See SDNY PLAN, *supra* note 12, at 2.

<sup>127</sup> SDNY PLAN, *supra* note 12, at 3.

<sup>128</sup> EDNY PLAN, *supra* note 3, at 4-5.

<sup>129</sup> EDNY PLAN, *supra* note 3, at 4-5.

<sup>130</sup> EDNY PLAN, *supra* note 3, at 4-5.

court order, the number of interrogatories to fifteen per side and the number of depositions to ten per side.<sup>131</sup>

It is difficult to predict how automatic disclosure as envisioned in the SDNY and EDNY Plans will ultimately affect clients. As discussed in subpart I(C) above, voluntary disclosure presents many difficult problems, particularly where there are genuine differences among counsel as to the nature of the dispute or the significance of a document. In addition, the required disclosure of information that counsel believes supports or contradicts a claim may provide opposing counsel with a "roadmap" to counsel's strategy in a case, thus bearing upon the attorney work product privilege.<sup>132</sup>

Notwithstanding the difficult issues raised by automatic "voluntary" disclosure, there are several potential benefits from the use of this disclosure under the SDNY Plan and the EDNY Plan that may make such experimentation worthwhile. First, the information and documents that counsel must voluntarily provide could otherwise be routinely obtained through depositions, interrogatories, or document requests.<sup>133</sup> Opposing counsel generally can use any one of these devices to determine which documents a party possesses or relied on in making its allegations. Second, because document requests are broadly interpreted by most federal judges, the careful crafting of lengthy requests to obtain the same documents has probably become an over-rated craft, especially for the gathering of routine documents.<sup>134</sup> Third, the fact that docu-

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<sup>131</sup> EDNY PLAN, *supra* note 3, at 7.

<sup>132</sup> For a discussion of the resistance to various forms of mandatory discovery disclosure, see Tobias, *supra* note 59, at 51. According to Tobias, most of these forms are modeled on the proposal to amend Federal Rule of Civil Procedure 26. Because of this they pose a difficulty because they would "significantly change traditional notions of discovery and thus, [are] highly controversial." *Id.*; see Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 267 (1992) (requiring parties to detail legal theories "might alert adversaries to legal theories they had not considered"); see also Laura A. Kaster & Kenneth A. Wittenberg, *Rule Makers Should Be Litigators*, NAT'L L.J., Aug. 17, 1992, at 15. According to the authors,

revised Rule 26 will, if adopted, require attorneys to disclose, without further request or definition by their opponents, all potential witnesses and all potentially relevant documents, whether or not supportive of their cause. What the attorney considers relevant (work product) and what the client directs the attorney to consider (attorney-client privilege) will have to be disclosed.

*Id.*

<sup>133</sup> See FED. R. CIV. P. 30-34.

<sup>134</sup> See *Hickman v. Taylor*, 329 U.S. 495 (1947). The Supreme Court noted that "deposition-discovery rules are . . . accorded a broad and liberal treatment." *Id.* at

ments must be automatically produced does not mean that counsel's analysis and expected use of the document will also be fully disclosed.<sup>135</sup> Fourth, automatic disclosure saves the expense of the initial document requests and part of the expense incurred when a party utilizes other discovery devices to determine if a particular document exists.<sup>136</sup> Finally, some litigants may be compelled to act more diligently at the outset of a litigation in order to comply with the requirements of automatic disclosure. In some cases, the need for prompt document production may induce litigants to proceed more thoughtfully even before commencing litigation. Whether the benefits of this "voluntary" disclosure will outweigh any perceived difficulties should become clearer as a result of the efforts in the Southern and Eastern Districts.

The effect of implementing discovery limitations is less difficult to assess. By placing presumptive limits on the number of depositions and interrogatories, the EDNY Plan offers important economies to litigants, as long as the limitations are appropriate to the case. Thus, provided that the limitations are not inflexibly applied so as to prevent necessary discovery, a limitation that forces counsel to identify only deponents who possess essential information or to propound interrogatories that are actually pertinent to the issues in the case will reduce the excessive use of depositions and interrogatories. Needless discovery is valueless to the client, and any mechanism that avoids such abusive discovery should be welcomed.

Another potential benefit of discovery limitations is that they can help promote clear thinking about a case from the outset. If interrogatories and document requests are viewed as isolated events in the litigation process that can be endlessly supple-

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507. "[T]he time-honored cry of 'fishing expedition,'—common from opponents of lengthy and duplicative document requests—should not 'serve to preclude a party from inquiring into the facts underlying his opponent's case.'" *Id.* See generally *Nalco Chem. Co. v. Hydro Techs., Inc.*, 397 F. Supp. 1146, 1187 (E.D. Wis. 1993) (interpreting "relevancy" concept liberally).

<sup>135</sup> See Winter, *supra* note 132, at 270. For example, the proposed amendment to Federal Rule 26 clearly states that work product and privileged materials need not be automatically disclosed. *Id.*

<sup>136</sup> See, e.g., FED. R. CIV. P. 34(b) ("The request shall . . . describe each item and category with reasonable particularity."); see also Winter, *supra* note 132, at 276 ("[G]iven the fact that the costs avoided by automatic disclosure are unnecessary but may be sufficient to prevent the litigation of some meritorious claims, the proposed amendments decrease costs while increasing the accuracy and even-handedness of the system.").

mented, counsel may fail to define the real issues in a case before serving such documents. By limiting the availability of these devices, the EDNY Plan will encourage counsel to make hard choices about where to expend its permitted discovery.

### C. Motion Practice

The EDNY Plan and the SDNY Plan adopt significant provisions that should ease the delay caused by motion practice and thereby benefit clients. Under the SDNY Plan, when a motion is not decided within sixty days of submission, the judge or magistrate judge shall report the motion and a quarterly report showing all such undecided motions shall be circulated to all members of the court.<sup>137</sup> Under the EDNY Plan, when a motion is not decided within six months, the clerk's office will contact the judge's chambers to ascertain the status of the motion, report its findings to the parties, and contact chambers thereafter at three-month intervals to learn the status of the motion.<sup>138</sup>

Invariably, some judges may regard these provisions as somewhat offensive and unduly regimented and mechanical.<sup>139</sup> On the other hand, clients have a legitimate interest in prompt dispositions of disputes.<sup>140</sup> We think that the EDNY Plan, with its periodic scrutiny of the disposition of motions, is particularly responsive to the concerns that clients and lawyers often have when a judge has unduly delayed a decision. Although one or more of the parties may be inclined to request that the court decide the matter without further delay, they are often hesitant to do so for fear that any annoyance the request may generate may be translated into an adverse ruling. By establishing a mechanical and automatic procedure to manage such delays through the clerk's office, the

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<sup>137</sup> SDNY PLAN, *supra* note 12, at 8.

<sup>138</sup> EDNY PLAN, *supra* note 3, at 9; *see* CJRA REPORT, DIST. OF KAN., *supra* note 3 (similar plan).

<sup>139</sup> *See* Mullenix, *supra* note 8, at 412. Representatives of the Judicial Conference of the United States Courts opposed the passage of the CJRA as an "unprecedented congressional intrusion into judicial rulemaking prerogatives." *Id.* Judge Aubrey E. Robinson testified before the Senate that the CJRA is "extraordinarily intrusive into the internal workings of the Judicial Branch. These are procedural matters which should be handled through the normal, Congressionally-mandated Rules Enabling Act process." *Hearings*, *supra* note 45, at 221.

<sup>140</sup> *See* John R. Setear, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352, 354 (1982); *see also* R. Lawrence Dessem, *Judicial Reporting Under the Civil Justice Reform Act: Look, Mom, No Cases*, 54 U. PITT. L. REV. 687, 714 (1993) ("The public has the right to demand accountability from its officials, especially those with life tenure.").

Eastern District will avoid possible prejudice and have the opportunity to resolve these situations more effectively and fairly.

Both the SDNY Plan and the EDNY Plan contemplate the use of pre-motion conferences to reduce the need for motions.<sup>141</sup> Under the SDNY Plan, potential motions should be considered at the case management conference for standard and complex cases<sup>142</sup> and by judges in all cases where advisable.<sup>143</sup> In addition, discovery disputes in the Southern District should be resolved either by oral motion or letter brief.<sup>144</sup> In the Eastern District, any party wishing to make a motion shall notify the court and the court shall hold a pre-motion conference within four weeks.<sup>145</sup> If the court fails to hold a conference, the motion may be made.<sup>146</sup> Letter submissions shall be used for discovery motions, as well as motions that are procedural in nature.<sup>147</sup>

Although we recognize the economies of pre-motion conferences, we offer one caveat. At times, judges, in an effort to expedite the judicial process, decide matters too quickly in pre-motion conferences. Judges may direct or strongly urge counsel not to make a motion where counsel has not had an opportunity to make a full presentation of the merits of the motion. Frequently, the problem is not the fault of the court, rather counsel may be inadequately prepared during the pretrial conference to articulate the merits of the proposed motion or counsel may simply be unpersuasive. Acknowledging the efficiencies which pre-motion conferences are designed to achieve, we nevertheless urge that courts must be careful not to be unduly precipitous during them. In some instances, counsel should be permitted to make motions if they strongly believe that the motions will be successful even if the court has substantial doubts.

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<sup>141</sup> EDNY PLAN, *supra* note 3, at 9; SDNY PLAN, *supra* note 12, at 4. *See generally* Winthrop, Stimson, Putnam & Roberts, *Overview of the Southern and Eastern District Civil Justice Reduction Plan*, in *TAKING SUCCESSFUL DEPOSITIONS IN COMMERCIAL CASES*, at 95, 102-03 (PLI Litig. and Admin. Practice Course Handbook Series No. 437, 1992), *available in* WESTLAW, JLR Database (discussing motion practice under respective plans).

<sup>142</sup> SDNY PLAN, *supra* note 12, at 3.

<sup>143</sup> SDNY PLAN, *supra* note 12, at 7; *see Civil Justice and Expense and Reduction Plan*, in *CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE*, at 805, 807 (PLI Litig. and Admin. Practice Course Handbook Series No. 431, 1992), *available in* WESTLAW, JLR Database (discussing advisory group findings regarding pre-motion conferences).

<sup>144</sup> SDNY PLAN, *supra* note 12, at 5.

<sup>145</sup> EDNY PLAN, *supra* note 3, at 9.

<sup>146</sup> EDNY PLAN, *supra* note 3, at 9.

<sup>147</sup> EDNY PLAN, *supra* note 3, at 10.

#### D. Encouragement of ADR

Perhaps the most exciting development under both the SDNY Plan and the EDNY Plan is the increasingly active use of ADR mechanisms.<sup>148</sup> Under the SDNY Plan, a two-year program of court-annexed mediation is mandatory for all expedited cases, as

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<sup>148</sup> See Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 425 (1986). Alternative dispute resolution has gained widespread recognition and use in the last 16 years. It has been defined as:

a set of practices and techniques that aim (1) to permit legal disputes to be resolved outside the courts for the benefit of the disputants; (2) to reduce the cost of conventional litigation and the delays to which it is ordinarily subject; or (3) to prevent legal disputes that would otherwise likely be brought to the courts.

*Id.* at 425-26.

ADR was designed to lower the cost, time, and overall drain on the courts, the parties, and the corporate world. See Eric D. Green et al., *Settling Large Case Litigation: An Alternative Approach*, 11 LOY. L.A. L. REV. 493, 494 (1978). Because ADR procedures are flexible and crafted by the parties themselves, they are generally speedier, more efficient, and more convenient. See Joseph T. McLaughlin, *Alternate Dispute Resolution*, in TRIAL EVIDENCE, CIVIL PRACTICE, AND EFFECTIVE LITIGATION TECHNIQUES IN THE FEDERAL COURTS 1993, at 335 (ALI-ABA, 1993), available in WESTLAW, JLR Database. But see Dayton, *supra* note 12, at 907-14 (disputing perception that ADR is more cost efficient since empirical data lacking).

The Executive Branch has also endorsed the expanded use of ADR in civil disputes. In President Bush's "Agenda for Civil Justice Reform," the Council on Competitiveness made five ADR-related recommendations:

- (1) Create a "multi-door courthouse" to permit the parties to choose between several different methods for resolving their dispute. Before the contest would be set for trial, the parties would attend a mandatory conference to identify the areas in controversy. At this conference the parties would be given the opportunity to resolve their claims through a variety of alternative dispute resolution mechanisms, including early neutral evaluation, mediation, arbitration, minitrial, and summary jury trial.
- (2) Members of the legal, business, and government communities should advocate dispute resolution techniques as an alternative to litigation.
- (3) In most cases, the right to sue should be conditioned on a showing that the parties have attempted, and failed, to resolve their dispute. The party alleging harm would be required to prove that it gave timely notice of the grievance prior to filing the suit, except where emergency or other circumstances require immediate resort to the courts without prior notice to the opposing party.
- (4) Both parties should be encouraged to evaluate their claims closely and attempt to settle their dispute. Settlement offers advanced prior to trial should be reinforced with financial incentives such as requiring that the party who rejected the compromise bear the additional costs of trial unless the outcome at trial exceeds the settlement offer.
- (5) Once a lawsuit has been filed, the parties should be required to attend regular conferences to discuss settlement.

PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 15-16 (1991)

well as a sampling of other civil cases that involve only monetary damages.<sup>149</sup> The court is required to establish a pool of voluntary mediators to conduct the mediation.<sup>150</sup> Neither the EDNY Plan nor the SDNY Plan requires a fee for the services of the mediators.<sup>151</sup> As set forth in the SDNY Plan, the mediator will direct settlement discussions, but will not evaluate the merits of a case.<sup>152</sup> At the initial case management conference, the judge and counsel will discuss whether any issue should be mediated.<sup>153</sup>

Mediators for a case are chosen at random and hold mediation conferences no later than 150 days after the filing of the last responsive pleading.<sup>154</sup> At least seven days before the mediation, the parties shall provide the mediator with copies of their pleadings and a memorandum, not exceeding ten pages, setting forth their contentions as to both liability and damages.<sup>155</sup> Upon consent, copies of the statement may be served on all parties.<sup>156</sup> No statement from the mediation session may later be offered as evidence or made known to the judge.<sup>157</sup>

The mediator has the discretion to schedule additional conferences with the consent of the parties,<sup>158</sup> and may require the presence of representatives of the parties at a mediation session.<sup>159</sup> In

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<sup>149</sup> See SDNY GUIDE, *supra* note 79, at 14; SDNY PLAN, *supra* note 12, at 5. Court-annexed arbitration is the most utilized form of mandatory ADR currently in practice in the federal courts. See Dayton, *supra* note 12, at 902. At least ten federal district courts employ some form of mandatory, court-annexed arbitration: Northern District of California, Middle District of Florida, Western District of Michigan, Western District of Missouri, District of New Jersey, Eastern District of New York, Middle District of North Carolina, Western District of Oklahoma, Eastern District of Pennsylvania, and Western District of Texas.

<sup>150</sup> SDNY GUIDE, *supra* note 79, at 15-16.

<sup>151</sup> EDNY PLAN, *supra* note 3, at 17; SDNY GUIDE, *supra* note 79, at 15-16; see CJRA REPORT, E. DIST. OF PA., *supra* note 3, at 37-38 (no mandatory compensation for mediators). The Eastern District's Plan defines mediation as "'pro bono' in the interest of providing litigants with a speedier and less expensive alternative to the burdens of discovery and a court room trial." *Id.* at 38.

<sup>152</sup> SDNY GUIDE, *supra* note 79, at 15.

<sup>153</sup> SDNY GUIDE, *supra* note 79, at 16.

<sup>154</sup> SDNY GUIDE, *supra* note 79, at 16.

<sup>155</sup> SDNY GUIDE, *supra* note 79, at 17.

<sup>156</sup> SDNY GUIDE, *supra* note 79, at 17.

<sup>157</sup> SDNY GUIDE, *supra* note 79, at 18. The EDNY Plan also mandates such a prohibition. See EDNY PLAN, *supra* note 3, at 39. "All proceedings at any mediation conference authorized by this Rule . . . shall not be reported, recorded, placed in evidence, made known to the trial court or jury, or construed for any purpose as an admission." *Id.*

<sup>158</sup> SDNY GUIDE, *supra* note 79, at 17.

<sup>159</sup> SDNY GUIDE, *supra* note 79, at 17.

the event the mediation effort does not result in settlement, the mediator may explore with counsel the possible use of other ADR methods.<sup>160</sup> Furthermore, the SDNY Plan calls for the compilation of records concerning mediated settlements as well as the creation of a comparative control group to test the effectiveness of the program.<sup>161</sup>

The EDNY Plan envisions the use of several ADR type mechanisms. Similar to the Southern District, the EDNY Plan establishes a program of court-annexed mediation for all civil cases filed on or after June 30, 1992.<sup>162</sup> This program, which makes use of volunteer mediators, is optional for litigants and is experimental.<sup>163</sup> The program's effectiveness will be periodically evaluated.<sup>164</sup>

The EDNY Plan continues the Local Arbitration Rule<sup>165</sup> requiring that all claims for monetary damages of \$100,000 or less be referred to mandatory arbitration, except for social security, tax, constitutional, and prisoners' rights cases.<sup>166</sup> If a party then seeks a trial de novo and does not obtain a more favorable result, that party is liable for the arbitrator's fees.<sup>167</sup>

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<sup>160</sup> SDNY GUIDE, *supra* note 79, at 19. Other ADR methods include summary jury trials and early neutral evaluation. *See* Dayton, *supra* note 12, at 894-900. The summary jury trial is a method to reduce the number of civil cases that go to trial. *Id.* at 894. Through this procedure, cases ready for trial are scheduled for a half-day mini-trial before a panel of six jurors. *Id.* It allows the litigants to view their cases in front of an impartial panel and encourages settlement based on the verdict. *Id.* at 894-95. Early neutral evaluation resembles mediation as the case is evaluated in advance by a neutral party based on written statements prepared by the attorneys addressing factual, legal, and procedural issues that are in issue. Overall, however, it is a less formal procedure than mediation. *Id.* at 898-900.

<sup>161</sup> SDNY GUIDE, *supra* note 79, at 19.

<sup>162</sup> EDNY PLAN, *supra* note 3, at 17.

<sup>163</sup> EDNY PLAN, *supra* note 3, at 17. The Eastern District provision for court-annexed mediation is optional, perhaps because, unlike the Southern District provision, the services of the mediator are not free. *Id.*

<sup>164</sup> EDNY PLAN, *supra* note 3, at 17.

<sup>165</sup> Local Arbitration Rule of the Eastern District of New York § 3A. The Local Rule, first promulgated in 1986, is authorized by Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4659 (1988) (codified at 28 U.S.C. § 652). The rule was included in a pilot program designed to explore whether mandatory, nonbinding arbitration encourages quick, less costly, and less formal resolution of civil cases. *See* H.R. REP. No. 889, 100th Cong., 2d Sess. 30-33 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 5991. *See generally* Ritzer v. National Org. of Indus. Trade Unions, 807 F. Supp. 257, 263 (E.D.N.Y. 1992) (analyzing permissible scope of EDNY court-annexed arbitration).

<sup>166</sup> EDNY PLAN, *supra* note 3, at 15.

<sup>167</sup> EDNY PLAN, *supra* note 3, at 15. However, if permission was granted to proceed in forma pauperis, the party will not be responsible for arbitrator's fees. *Id.*



Finally, the EDNY Plan creates a neutral evaluation program for civil cases filed on or after June 30, 1992.<sup>168</sup> The neutral evaluator, an expert in the type of case assigned, will help the parties identify issues, explore settlement, assist in creating a discovery plan, and where appropriate, offer a nonbinding evaluation of the case.<sup>169</sup>

However they are characterized, these ADR mechanisms offer the parties an opportunity to resolve their dispute outside the boundaries of traditional litigation.<sup>170</sup> The mechanisms, whether under the guidance of a mediator, arbitrator, or neutral evaluator, allow parties to focus and refine the issues in dispute and are, thus, beneficial to all concerned. Both the SDNY Plan and the EDNY Plan provide opportunities for litigants to reach such an alternative resolution.

### III. RECOMMENDATIONS

To ensure that the CJRA reforms are helpful to a client, there are a few basic steps that counsel and client are advised to take in any case. First, at the outset, counsel and client should review the expense and delay reduction plan in the district in which the action is pending to determine the aspects of the plan that are either beneficial or detrimental to the client's case. In the case of a plaintiff with a choice of forum, the relevant plan may be a factor in forum selection.

Second, counsel and client should carefully prepare for the case management conference. An effort should be made to prepare for a review of each of the potential issues at such a conference as set forth in Federal Rules 16 and 26(f). By doing so, counsel and client will ensure that the time necessary to resolve these issues, and the resulting expense, will be minimized.

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<sup>168</sup> EDNY PLAN, *supra* note 3, at 15-16.

<sup>169</sup> EDNY PLAN, *supra* note 3, at 15-16; see David A. Rammelt, "Inherent Power" and Rule 16: How Far Can a Federal Court Push the Litigation Towards Settlement?, 65 IND. L.J. 965 (1990); see also *supra* note 64 and accompanying text. One advantage of court-annexed arbitration is that the parties, from the time of filing suit, are on notice that the case will be subject to arbitration, thereby allowing the parties to plan their discovery and case preparation accordingly. Rammelt, *supra*, at 993.

<sup>170</sup> McLaughlin, *supra* note 148, at 367. Proposed changes to the Federal Rules of Civil Procedure also view ADR as an alternative to litigation. *Id.* The proposed changes to Rule 16(c)(a) contemplate that "the use of special procedures to assist in resolving the dispute" is an appropriate topic for discussion at pretrial conferences." *Id.*

Third, counsel and client may especially benefit from the consideration of available ADR mechanisms that are included in many CJRA expense and delay reduction plans. While there will continue to be cases where neither settlement nor ADR is possible, the systematic use of ADR mechanisms may prove productive by proposing solutions that attempt to accommodate the complex needs of the parties.<sup>171</sup> Counsel and client are well advised to at least consider the ADR methods that are available in the district. In view of the potential savings of time and money and the basic reality that most civil litigations are ultimately resolved before trial, it is useful for counsel and client to review these possibilities on an ongoing basis.

Finally, as in any program of litigation management, counsel and client should carefully budget the case in advance. The costs for compliance with the applicable provisions of an expense and delay reduction plan must be carefully considered to ensure that clients participate in the expense and delay reduction efforts relevant to the case. Moreover, it is only by monitoring the results of expense and delay reduction efforts that a client's voice will remain a meaningful part of the expense and delay reduction discussions that are currently taking place throughout the nation.

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<sup>171</sup> See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 12 (1991).

